NO. 22586

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY JOE MARTIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney

JOSEPH W. MILCHEN,
Assistant U. S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America

NO. 22586

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY JOE MARTIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney

JOSEPH W. MILCHEN,
Assistant U. S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America

TOPICAL INDEX

		Page
ble of Authorities		iii
	STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION	1
.	STATUTES INVOLVED	2
I.	STATEMENT OF THE CASE	3
	A. Questions Presented	3
	B. Statement of the Facts	3
.	ARGUMENT	14
	A. THE ADMONITION GIVEN TO APPELLANT WITH REGARD TO THE NATURE OF HIS CONSTITUTIONAL RIGHTS WAS IN COMPLETE COMPLIANCE WITH THE REQUIREMENTS OF MIRANDA.	14
	1. The Oral and Written Advice	14
	2. Precision v. Sufficiency	19
	3. The Waiver	20
	B. ASSUMING THAT THE STATEMENTS WERE TAKEN IN VIOLATION OF MIRANDA, IMPEACHMENT OF APPELLANT WAS PROPER.	25
	1. Waiver of Objection	25
	2. Voluntary Falsehood by Appellant	26
	3. Propriety of the Inquiry as Cross-Examination	27

OPICAL INDEX (continued)

	Page
4. Distinguishing Groshart	28
C. THE TRIAL JUDGE DID NOT IMPOSE A MORE SEVERE SENTENCE ON APPELLANT BECAUSE APPELLANT INDICATED HIS PLAN TO APPEAL.	29
CONCLUSION	31
ERTIFICATE	32

TABLE OF AUTHORITIES

(Cases) Page

Bell v. United States,
382 F.2d 985 (9th Cir. 1967) 15

Groshart v. United States,
_____F.2d ____ (9th Cir. March 27, 1968) 22

Miranda v. Arizona,
384 U.S. 436 (1966) 14

Statutes

Title 18, United States Code,
Section 3231 2

Title 21, United States Code,
Section 174 1,2

Title 28, United States Code,
Section 1291 and 1294 2

NO. 22586

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY JOE MARTIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On April 26, 1967 the federal grand jury for the Southern District of California returned a two-count indictment (No. 947-SD) charging appellant in Count One with a violation of Title 21, United States Code, Section 174 (smuggling narcotics). In Count Two appellant was charged with a violation of Title 21, United States Code, Section 174 (concealment and transportation of illegally imported narcotics). Clerk's Transcript, pp. 2-3 (hereinafter referred to as C.T.).

On May 25, 1967 an omnibus hearing was held in open court, pursuant to local rules. At that time appellant was given an opportunity to indicate if there were any motion to suppress "admissions or confessions made by

defendant because of . . . (3) violation of the Miranda Rule . . . ." See specifically id. at 7. Appellant made no such motion. Id. Reporter's Transcript, pp. 2-4 (hereinafter referred to as R.T.).

On September 12, 1967 a trial by jury commenced in this matter. On September 13, 1967 appellant was found guilty of both counts of the indictment by a jury. C.T., p. 14.

On October 23, 1967 appellant was sentenced by the Honorable Fred Kunzel to a 10-year period of incarceration on each count, to run concurrently. Id., at 17. The court also recommended that the Attorney General designate appellant's place of confinement to be the state institution where appellant was presently serving s state sentence. Id. A timely Notice of Appeal was filed. Id. at 18.

The offenses occurred in the Southern District of California, and jurisdiction of the District Court was based on Title 21, United States Code, Section 174 and Title 18, United States Code, Section 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Section 1291 and 1294.

II.

STATUTES INVOLVED

Title 21, United States Codes, Section 174 reads in pertinent part as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its

control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

III.

STATEMENT OF THE CASE

A. Questions Presented

1. Did the lower court err in holding that the warning given to appellant at the time of his arrest was defective and in violation of the Miranda rule?
2. Did the lower court err in permitting impeachment of appellant's false testimony regarding whether or not he had told customs officials of an individual named "Jupiter"?
3. Did the lower court impose a more severe sentence on appellant due to appellant's announced intention to appeal the conviction and judgment?

B. Statement of the Facts.

On March 29, 1967 Customs Inspector Raymond L. Geiger was on uty at the Port of Entry, San Ysidro (San Diego), California, inspecting ehicular traffic entering the United States from Mexico. R.T., pp. 7-8.

At approximately 11:50 p.m. appellant entered the United States from Mexico as the driver of a 1956 Buick. Id. at 8-9. Inspector Geiger inquired of appellant's citizenship, and appellant stated he was an American citizen. Id. at 9. In reponse to an inquiry as to what appellant was bringing from Mexico, appellant declared two pictures, two cats and a black hat. Id.

Inspector Geiger also asked appellant what he was doing in Mexico. Id. Appellant replied that he was just "out having a good time, partying." Id. Appellant went "into detail" about his trip, talking "about going down, partying, drinking and seeing the girls." Id. at 10.

Inspector Geiger took appellant to the secondary inspection area, and commenced to conduct a search of appellant's person. Id. Appellant was wearing a dark-brown suit coat when he entered the search room, id., and when appellant was riding in the car. Id. at 39, 40. In the search room, Inspector Geiger asked appellant to remove his coat, which appellant did, and Geiger took possession of the coat. Id. at 11. Geiger noted a heaviness and bulkiness on one side. Id. When Geiger started to look inside the coat, appellant said, "I bet I know what that is, somebody must have put that there." Id. at 32. This statement was not in response to any question put to appellant by Geiger. Id. Inside the coat Geiger found some pink tissue paper with five rubber contraceptives inside. Id. at 34. The contents of the rubber contraceptives was heroin. Id.

Inspector Geiger also found $551 on appellant. Id. at 43.

Appellant had conversations with Inspector Geiger, but never mentioned

anything with regard to a person named "Jupiter." Id. at 7-11, 32-43.

During the early morning hours of March 30, 1967 at the secondary inspection area at the Port of Entry, San Ysidro (San Diego), California, Customs Agent James Jackson had a conversation with appellant with regard to this incident. Id. at 19-20. Prior to Jackson's asking appellant any questions, he orally advised appellant as follows:

> "I advised Mr. Martin that he did have certain constitional rights, that he had a right to remain silent, that he didn't have to make any statements, sign any papers unless he so desired, that he was entitled to and would be provided with an attorney of his choice, and if he couldn't afford one, the government would provide one at any and all times of the proceedings relative to his interrogation." (Emphasis added.) Id. at 20.
>
> "He was advised that the statements he did make, if he chose to make any, could and might be used against him. I didn't say that they would be. I said they could and may be used against him." Id.

Appellant was then supplied with a "rights waiver" form, which he executed. Id. at 20-21. This form was marked for identification, but not received into evidence, id. at 35, 37, although appellant was not opposed to its being received into evidence. Id. at 18. The record is clear that the trial judge examined the "rights waiver" form. Id. at 22, 35, 37.

The advice contained in the "rights waiver" form is as follows:

"STATEMENT OF RIGHTS"

"Before we ask you any questions, it is my duty to advise you of your rights.

"You have the right to remain silent.

"Anything you say can be used against you in court, or other proceedings.

"You have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning.

"You may have an attorney appointed by the U. S. Commissioner or the Court to represent you if you cannot afford or otherwise obtain one.

"If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting a lawyer.

"HOWEVER . . . . . .

"You may waive the right to advice of counsel and your right to remain silent and answer questions or make a statement without consulting a lawyer if you so desire.

- -

"WAIVER"

"I have had the above statements of my rights read and explained to me and fully understand these rights. I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or imunity. I was taken into custody at 11:51 P.M. (time), on 3/29/67 (date), and have

signed this document at 12:00 A.M. (time), on 3/30/67 (date).

Billy Joe Martin /s/
(name)

"Witness:

James W. Jackson /s/
(name)

Printice N. White /s/ "
(name)

Agent Jackson further testified as follows:

"Mr. Milchen: I will ask you, Mr. Jackson, if you explained to him [appellant] the right to have an attorney at the interview [after arrest]?

Mr. Jackson: At all stages of the proceedings.

Mr. Milchen: Did you specifically explain to him that he had a right to have an attorney at that interview?

Mr. Jackson: I don't recall that I worded it exactly like that or not." Id. at 23-24.

The trial court then commented with regard to the nature of the advice as follows:

"[T]he statements that were taken clearly indicates that Miranda was not complied with. Miranda provides that the burden of proof is upon the government to prove that the defendant intelligently and understandingly waived his right to have counsel present at the time his statement was taken, and that the burden is upon the government to prove that.

It says it so clearly that there isn't question about it." Id. at 21.

"Here is the oral advise: 'You may have an attorney appointed by the Commissioner or the Court to represent you if you cannot afford to or otherwise obtain one.'

"What should be stated and what I presume is being stated now is that, 'You have a right to have an attorney present at the interview and if you can't afford one, an attorney will be provided for you before we interview you.'

"Then he must understand it or must be shown that he understood that he is entitled to have an attorney present at the interview." Id. at 22.

Appellant, the court, and appellee are agreed that appellant's signing the "rights waiver" form would be prima facie evidence that appellant understood his rights. Id. at 23.

After being so advised, appellant made some damaging statements. Id. at 24-26. The court indicated that the admissions and confessions could not be introduced into evidence, in direct or rebuttal. Id. at 26, 27. Those damaging statements were not used in direct or rebuttal for any purpose by appellee. Id. at 7-11, 32-43, 43-45, 80-83.

Appellant did object to the introduction of appellant's statement either in direct or rebuttal for purposes of impeachment on important issues as well as collateral issues. Id. at 16, 17-18. However, after the trial court had ruled that the admissions and confessions could not be used, id. at 26, 27,

ppellant indicated that the only statements made by appellant which were ft related to appellant's having gone to a house of ill repute and that he got unk. Id. at 27. Counsel for appellant then stated:

"All right, if that's all that's going to come in, that all he told Mr. Jackson is that he went to the house of ill repute and that he got drunk, I would have no further objection." Id.

The lower court, using its discretion, refused to permit appellee to in- uire, once appellant testified, if appellant had ever been connected with a lony. Id. at 30. The nature and date of the conviction were not to be gone to. Id. The lower court threatened contempt upon counsel for appellee if e were to ask the question, and not merely sustain an objection thereto. Id. 30-31. As a result, appellee made no inquiry whatsoever of appellant with gard to the prior felony conviction. Id. at 57-66, 71-79.

In spite of the prohibition on appellee from going into the matter, appel- nt mentioned on direct examination that he was "out of prison," id. at 49, at he "'been locked up long time,'" id. at 51, and "me being locked up," id. n cross-examination, in response to an inquiry whether or not appellant ought it strange for "Jupiter" to give him a large sum of money, appellant sponded by stating in part that,"I had been in prison." Id. at 65.

Even after the prior felony conviction had been volunteered four times by ppellant, the trial court still refused to permit appellee to ask the question the existence of the prior felony conviction. Id. at 69-70. This colloquy ccurred when appellee was about to request the instruction concerning

impeachment of a defendant because of a prior felony conviction. Id. at 69-70.

The trial judge acknowledged that he was clearly abusing his discretion when he stated, "Of course, the government can appeal from my ruling." Id. at 29. He further stated that "I know the government can take an appeal and I don't like to take it upon myself to become a Court of Appeals, ..." Id. at 30.

Customs Agent James Jackson testified that the contraband in question had value. Id. at 45.

Appellant was the only witness in his defense, and related an incredible set of circumstances to explain how it came to be that heroin was located in his coat unknown to him. Id. at 48-65, 71-80. A person named "Jupiter" figured prominently in all parts of appellant's explanation. Id. at 49-54, 60-65, 71-76.

During cross-examination, the crucial colloquy occurred:

"Mr. Milchen: Did you tell the customs officials at the border about Jupiter?

"Mr. Martin: Yes, I told them.

"Mr. Ely: Your Honor, could we approach the bench on this?

"The Court: Yes.

(The following proceedings were had at the bench, outside the hearing of the jury.)

"Mr. Ely: That is the whole point. Mr. Milchen just sidestepped the order given. I think the whole point of keeping

that out was to keep the jury from knowing that certain things were not said at the border.

"The Court: Well, no harm has been done as yet. He said he did tell them about Mr. Jupiter.

"Mr. Ely: Yes. Well, I would like the course of questioning to be discontinued immediately as to what he said at the border.

"Mr. Milchen: I wasn't going to go into it any further.

"The Court: All right, no harm has been done." Id. at 75-76.

The matter was not gone into any further in cross-examination. Id. at 76-80.

In rebuttal, appellee called Customs Agent James Jackson. Id. at 80. Before he testified, the following colloquy occurred out of the presence of the jury:

"Mr. Milchen: I desire to ask Mr. Jackson if the defendant ever mentioned a man named Jupiter to him.

"Mr. Ely: That I would certainly object to as being part of an admission in a statement of course, and your Honor's order is that nothing in that statement is supposed to come out, except that he was in a whore house and he was drunk. That is exactly the one thing I was trying to keep out, the failure to mention Jupiter, that is what the motion was all about.

"The Court: Oh, no.

"Mr. Ely: Well, there was a change . . .

"The Court: There were some poisonous statements made.

"Mr. Ely: I think Mr. Milchen's question was improper when he asked the defendant, but apparently your view was that the harm had been minimal, whatever it was, and having already ruled on it, I think this is just compounding it. I would definitely object to asking him this question. It's going into that part of the statement which was suppressed under Miranda.

"The Court: I think I'm going to allow it under the theory that it is a matter of collateral and can be used for the purpose of impeachment. All right, go ahead." Id. at 80-81.

Jackson testified that he did not recall appellant ever saying anything to him about a man named "Jupiter." Id. at 82.

Appellee accepts the version of the facts that occurred after the jury returned its verdict, and appellant first indicated his intention to appeal this case. Appellant's Brief, pp. 8-9. Appellee however would supplement those facts with those which occurred at the acutal time of sentencing. Appellant failed to designate those proceedings as part of the record at the time appellant filed his opening brief. However, since that time, appellant has joined appellee in amending the record on appeal to include the proceedings at that time. The crucial statements that bear on this issue that occurred then are set forth as

llows:

"Mr. Ely: Well, certainly, in order to - - We've already discussed whether or not an intention to appeal is to be a factor - -

"The Court: Oh, that's not a factor at all.

"Mr. Ely: Well, that being so, I'm sure that - - "R.T., p. 131.

The question of the severity of the sentence, being above the mandatory inimum, was also influenced by appellant's refusal to talk with the Probation Department about the offense. The record shows as follows:

"The Court: Well, would you talk to the Probation Officer?

"Defendant: No, I refuse to talk. I'm ready for sentence.

"The Court: What?

"Mr. Ely: He will not apparently, your Honor." Id. at 132.

Defendant also had a prior felony conviction for rape for which he served very long period of time in San Quentin. Id. Appellant also had a conviction in his youth. Id.

The amount of contraband, five ounces of heroin, was recognized to be a ubstantial quantity at the time of sentencing. Id. at 133.

There was nothing extenuating in appellant's situation, as found by the ower court. Id. at 133-34. However, the lower court did show appellant eneficent consideration by recommending to the Attorney General that his lace of confinement be the state institute which appellant was then confined. d. at 134.

IV.

ARGUMENT

A. THE ADMONITION GIVEN TO APPELLANT WITH REGARD TO THE NATURE OF HIS CONSTITUTIONAL RIGHTS WAS IN COMPLETE COMPLIANCE WITH THE REQUIREMENTS OF MIRANDA.

1. The Oral and Written Advice.

In Miranda v. Arizona, 384 U.S. 436 (1966), the Court indicated its holding as follows:

"To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently

waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Id. at 478-79.

The Court also said specifically with regard to the right to have an attorney present during interrogation the following:

"Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation under the system for protecting the privilege we delineate today." Id. at 471.

Appellee is put in the unusual position of arguing for an affirmance of the judgment below based on a clearly erroneous ruling by the trial judge, which in turn led to the alleged erroneous ruling urged by appellant. However, appellee will so argue that the oral and written advice given to appellant with regard to his constitutional rights was in complete compliance with Miranda, particularly as interpreted by this court in Bell v. United States, 382 F.2d 985 (9th Cir. 1967). The short answer to this appeal is to hold that Miranda and Bell were fulfilled. What followed in the lower court then becomes inconsequential.

To complete the legal picture with regard to the rendering of advice to criminal defendants concerning the nature of their constitutional rights, consideration must be given to Bell v. United States, supra. In Bell defendant was not advised orally on the subject. He was presented with a document

containing clearly valid advice concerning his rights. Defendant signed the document, and indicated that he could read and write. Id. at 986. In response to the argument that defendant should have been given oral advice, this court said at 987:

"This is absurd. If appellant read and understood the written advice, then he acquired knowledge of his rights in a very satisfactory way. There is no requirement as to the precise manner in which police communicate the required warnings to one suspected of crime. The requirement is that the police fully advise such a person of his rights, and appellant made no showing that he did not read or understand the written warnings which were presented to him."

Appellant states that the ruling that Miranda had been violated was "plainly correct." Appellant's Brief, pp. 10, 15. The alleged defect went to whether or not appellant was advised that he had a right to the presence of an attorney during the interrogation, and whether or not he waived that right. Id. Another issue raised with regard to the warnings given relates to whether or not appellant was advised of the consequences of making a statement at that time. Id. at 15-16, fn. 4. These arguments were made by appellant without the benefit of the presence of the "rights waiver" form which the Court below considered in ruling on the admissibility of the damaging admissions made by appellant.

The record clearly shows that appellant was adequately warned of his constitutional rights.

Appellant was given both oral and written advice, thus going beyond Bell where only written advice was given. With regard to the specific issue in question, he was orally advised that "if he couldn't afford one [an attorney], the government would provide one any and all times of the proceedings relative to his interrogation." R.T., p. 20. The written advice on this subject was as follows:

"You have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning.

"You may have an attorney appointed by the U.S.Commissioner or the Court to represent you if you cannot afford or otherwise obtain one.

"If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting a lawyer.

"HOWEVER . . . . . .

"You may waive the right to advice of counsel and your right to remain silent and answer questions or make a statement without consulting a lawyer if you so desire." C.T., p. .

The advice is so clear on its fact that it denies logic to argue that appellant was not warned that he had a right to have an attorney present at that interview.

The lower court apparently based its argument on the idea that appellant was not warned that he had a right to have his appointed, as distinct from

retained, counsel present at that interview. R.T., p. 22. However, Agent Jackson orally told appellant that the government would provide him with an attorney "at any and all times of the proceedings relative to his interrogation." Id. at 20. The "rights waiver" form specifically informed appellant that he had a right to have an attorney "present with you during questioning." C.T. p. . The form then explained that appellant would be appointed an attorney if he could not afford one. Id. The form explicitly informed appellant that he could terminate the questioning at any time if he desired to consult an attorney. Id. This information goes far beyond Miranda. Finally the advice concerning waiving his rights specifically indicates that the absence of counsel is contemplated at that questioning if appellant decided to waive his right to an attorney at that time. Id.

In considering this issue, it cannot be emphasized too heavily that the only factual basis for any holding was the "rights waiver" form and the testimony as to the oral statements by Agent Jackson. Appellant offered no evidence whatsoever on the nature of the advice as to his constitutional rights that was given to him. There was no contradiction at all on the issue of what was orally said on this issue or what was contained in the written document. There was no conflict in the evidence, where one version was accepted and the other rejected by the lower court. There is no conflict as to what words and writings were spoken and written on the nature of appellant's constitutional rights.

2. Precision v. Sufficiency

To argue that the advice is defective for lack of a specific statement to the effect that appellant had a right to an appointed counsel at that questioning is to quibble about the preciseness of the warning and aims not at the sufficiency of the warning. In context, both the oral and written advice clearly informed appellant that he had a right to an appointed counsel at that questioning.

Bell makes it quite clear that "preciseness" is not the crucial issue in determining the sufficiency of advice given. Bell v. United States, supra at 987. "There is no requirement as to the precise manner in which police communicate warnings to one suspected of crime." Id. The fact that, in the written advice, the statement about appointing counsel (if appellant could not afford one) follows the statement about the right to have an attorney present at that questioning - - this fact goes to "preciseness" and not to sufficiency. In context, there is no question that appellant fully knew that he could have an attorney, retained or appointed, at that interview.

Similarly Agent Jackson's phraseology was to the effect that appellant could have retained or appointed counsel "at any and all times of the proceedings relative to his interrogation." R.T., p. 20. This phraseology goes to the "preciseness" of the language used, and not to the matter of how sufficiently that language advised appellant that he could have a lawyer at that very time. Appellee concedes, as did Agent Jackson did on the witness stand, that appellant was not specifically told the words "you have a right

to have an appointed counsel at this time." The advice was not "worded . . . exactly like that . . .," id. at 24 , but it was clearly and unequivocally and sufficiently given.

The precision of the oral advice was also admittedly defective with regard to the consequences of appellant's talking at that time. Agent Jackson told appellant that his statements "could and might be used against him." Id. at 20. He did not say that they would be, but that they "could and might be used against him." Id. On the other hand, the written advice conforms precisely to the requirements of Miranda on this issue by using the exact language of Miranda , namely that the statements "can be used against" appellant in court. Miranda v. Arizona, supra at 479; C.T., p. .

The point is that the written advice meets the precision that Bell does not require, and the oral advice clearly is sufficient, though not precise.

3. The Waiver

The lower court attributed part of the alleged deficiency of the Miranda warning on the fact that the "burden of proof is upon the government to prove that the defendant intelligently and understandingly waived his right to have counsel present at the time his statement was taken, and that the burden is upon the government to prove that." R.T., p. 21. However, appellant, appellee, and the lower court all agreed that appellant's signing of the "rights waiver" form constituted prima facie evidence that appellant did knowingly and understandingly waive his rights. Id. at 23. Thus, appellee had met its

ırden in this area. Appellant made no showing whatsoever that he did not ad or understand the written advice given him. Bell requires that a criminal efendant must make some such showing in order to avoid the consequences of s written waiver. Bell v. United States, supra at 987. In the facts thus esented, there is no question but that appellant did waive his rights.

Appellant specifically waived the right to have an attorney, retained or ppointed, present at the time he made statements to Agent Jackson. The ights waiver" form states that "you may waive the right to advice of counsel . . and answer questions or make a statement without consulting a lawyer you so desire." C.T., p. . The idea is clearly presented that appellant ould have counsel present at that interview or waive his counsel's presence. is advice about waiver occurs after "counsel" has been "defined" to include th retained or appointed counsel. Id. There then follows the waiver in ese words:

"I have had the above statements of my rights read and explained to me and fully understand these rights. I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or imunity. I was taken into custody at 11:57 p.m. (time), on 3-29-67 (date), and have signed this document at 12:00 a.m. (time), on 3-30-67 (date).

Billy Joe Martin
(name)

Witnesses:

James W. Jackson
(name

Prentice N. White"
(name)

4. Explaining the Ruling Below

With the record so clear below on the issue of the sufficiency of he nature of the advice given to appellant with regard to his constitutional ights, appellee respectfully submits that the lower court rendered a clearly rroneous ruling, with no factual basis, on this issue. If this court so inds, the alleged error derivative from the ruling evaporates, and the conviction should be affirmed.

Appellee also recognizes the extreme difficulty in asking this court to overturn a ruling by the lower court on a factual issue. Thus, appellee respectfully tenders an explanation of the ruling below, supported by the evidence in the record, which explanation does not rest on a factual showing by appellant that would sustain the ruling. In the first place, it is undeniably clear that appellee did not in this case, and does not have a right to appeal an adverse jury decision. Thus, the lower court was equipped with the ability to rule adversely to appellee, knowing that the only instance when such a ruling might be called into question occurs when appellant takes an appeal. The lower court was well aware that appellant could not be harmed by a ruling favorable to him and adverse to appellee, unless unusual circumstances arose. Unfortunately, those unusual circumstances have arisen in this case.

The "unusual"circumstances arise from the fact that Groshart v. United States, __ F.2d ___(9th Cir. March 27, 1968) applies to this appeal, whereas the law prior to Groshart prevailed at the time of trial.

The simple fact is that the lower court was bending over backwards to ist appellant in this case, knowing the government could not appeal any ng. This fact is demonstrated by the lower court's ruling on the issue ntroducing into evidence the fact of appellant's prior felony conviction. s too well established to cite authority that the fact of a prior felony con- tion is admissible. The date and nature of the felony conviction are tters for judicial discretion, but not the existence of the conviction itself. spite of this fact, the lower court refused any such evidence to be elicited appellee, and even refused to permit it after appellant had volunteered that t four times. Id. at 49, 51, 65. That the lower court was clearly in error s demonstrated twice by the court itself when it stated that "the govern- nt can appeal from my ruling," id. at 29 and that "I know the government n take an appeal and I don't like to take it upon myself to become a Court Appeals, ..." Id. at 30.

The issue of the prior felony conviction and the ruling of its inadmissibility es to show the lower court's disposition on rulings favorable to appellant d adverse to appellee.

The lower court, as do many trial courts, looked at the evidence of over- helming guilt, and unilaterally decided to control the amount of evidence on e issue of guilt, regardless of its admissibility or inadmissibility. The case gainst appellant was overwhelming just by virtue of the fact that the contra- and was found on his person, id. at 34, and that appellant had acknowledged s presence by spontaneously stating "I bet I know what that is, somebody

must have put that there." Id. at 32. Any more evidence tendered by appellee would be basically unnecessary, regardless of its admissibility.

In view of such a case, it is understandable that the lower court could unilaterally provide a defendant under such circumstances with whatever physhological benefits that might accrue from favorable rulings. It is more understandable in view of the certain conviction, and the absence of appeal by appellee.

The shock registered by the lower court immediately after the jury returned the verdict at appellant's intention to appeal, id. at 126a, is further evidence that the lower court deliberately made rulings favorable to appellant, regardless of the correctness of those rulings. In fact, the trial judge announced that "there was nothing in this case where . . . anything prejudicial to the defendant came in." Id.

However, these facts are presented only to explain the "extra-judicial" reasons behind the ruling that the Miranda requirements were not met. They must be presented because the factual basis simply does not exist.

Now appellant tries to take advantage of the clearly erroneous, but favorable ruling, to avail himself of the intervening rule of Groshart. Appellant should not be permitted to utilize the erroneous ruling to upset what then was a clearly correct ruling according to the law existing at that time. This court should take the whole situation into consideration, and overturn the ruling on the admissibility of the statements, holding that Miranda and Bell had been complied with. Then, there is no Groshart issue that needs to

e analyzed.

. ASSUMING THAT THE STATEMENTS WERE TAKEN IN VIOLATION OF MIRANDA, IMPEACHMENT OF APPELLANT WAS PROPER.

1. Waiver of Objection

Appellee starts with the law as now set forth in Groshart v. United States, supra. Thus, the main portion of Appellant's Brief, arguing for a reversal of the rule of Walder is superfluous, and requires no attention.

First, appellee submits that appellant has not preserved his record on appeal on this issue. When the question of appellant's statements to Agent Jackson first arose, appellant indicated that he would have no objection to the introduction into evidence of the fact that appellant had gone to a house of ill repute and had become inebreated. R.T.,p.27. Presumably those matters were thus conceded by appellant to be admissible for purpose of impeachment if appellant testified otherwise. Id.

Appellant testified on direct examination that "we [Jupiter and appellant] went to this house everybody had been talking about." Id. at 52. Wnen asked if he was referring to a house of "ill fame," appellant responded in the affirmative. Id. Further, appellant testified that Jupiter gave him some tequilla, id., which must have been drugged because he had only one drink. Id. at 73.

Thus, the situation arose during the trial where appellant testified on the two items which appellant and his counsel had waived any objection to

mpeachment by use of the statements ruled to have been taken in violation of Miranda. The two subject matters involved a person named Jupiter. The nquiry on cross-examination was entirely proper, in view of appellant's estimony on direct and the waived objection.

It is most difficult to visualize appellant's successfully claiming reversal rror on a matter which he expressly waived in the lower court.

It is true that appellant did tender what could be construed to be an bjection to the questioning on the ground that the question was impeachment y using statements allegedly taken in violation of Miranda. Id. at 75-76. Iowever, this objection came after appellant had apparently stated that he ould not object to a question on that specific matter. Id. at 27. Even if he question was objectionable as a matter of law, appellant had virtually ulled appellee into relying on appellant's apparent consent to an inquiry into hose matters. The later objection, appellee submits, cannot now be held o successfully vitiate appellant's waiver of objection.

2. Voluntary Falsehood by Appellant

Second, it is apparent that the objection to the crucial question was on he ground that it was improper impeachment by use of statements allegedly aken in violation of Miranda. Id. at 75-76. There was no objection on the asis that the cross-examination itself was improper because the matter had ot been gone into on direct examination, or any other ground. Any error on hat ground has not been preserved for this court's consideration. Rule 18(2) d), Rules of the Court of Appeals for the Ninth Circuit. Thus, there is no

istinction between the fact that appellee initiated the inquiry on "Jupiter" nd that appellant did not voluntarily bring the matter into issue. The con- ext in which the question arose and the nature of the objection compels the conclusion that the issue can be considered as though appellant volunteered he falsehood about whether or not he mentioned "Jupiter" to the customs fficials.

Viewing the matter thusly, the situation is not a Groshart case, but a case on all fours with United States v. Armetta, 378 U.S. 658, 662 (2nd Cir. 1967), cited with approval in Groshart at page 9, footnote 4 of the slipsheet as follows:

> "Of course, the inability of the prosecution to use the defendant's statements would not prevent their admission where the defendant himself voluntarily seeks their introduction. . . . . [citing Armetta]."

A defendant can "voluntarily" introduce evidence by eliciting it in direct examination or by failing to object during cross-examination. The case at bar is of the latter nature, and falls within the exception noted in Groshart, and approved by Armetta.

3. Propriety of the Inquiry as Cross-Examination

Assuming that Groshart might apply to the question asked in this case, the question was still proper cross-examination and not in violation of Groshart. The specific inquiry was whether or not appellant had told "customs officials at the border about Jupiter." Id. at 75. Previously Customs Inspector Geiger had testified that he was a Customs offical,

Id. at 7, and was working at the border at the time and place in question. Id. at 7-8. Geiger had a conversation with appellant with regard to appellant's presence in Mexico. Id. at 9. Appellant went "into detail" about the trip, talking about "going down, partying, drinking and seeing the girls." Id. Upon discovery of the contraband by Geiger, appellant made reference to another person. Id. at 32. Appellant never said anything about someone named "Jupiter" to Inspector Geiger. Id. at 7-11, 32-43.

Thus, with Geiger's testimony on the record, the question can properly be construed to refer to Geiger as a "customs official." Geiger's testimony did not contain any reference to "Jupiter," and thus an inquiry into whether or not appellant told Geiger about "Jupiter" was relevant and proper. This fact is particularly true in view of appellant's testimony on direct examination that he had conversation with Geiger at the border. Id. at 54-57.

4. Distinguishing Groshart

Finally, assuming that Groshart might apply and that the question went to impeachment not of what was said to Geiger, but what was said to Agent Jackson in the Miranda situation, appellee submits that Groshart is clearly distinguishable. Groshart dealt with statements that were actually made, and later used to impeach the defendant. The case at bar deals with silence, namely statements that were not made. Silence means so many things that it means nothing.

The failure by appellant to mention "Jupiter" might have resulted, as appellant suggested in his brief, from that failure by Agent Jackson to make

specific inquiry on the subject. Appellant's Brief, p. 35. Appellant complains of this fact, but offers only a California, not a federal, case in support of his contention.

The point is that appellant lied about what he told both Geiger and Jackson. He perjured himself by claiming to have made statements that he did not in fact make. The existence of those statements was in issue, and not the content thereof, which was the issue in Groshart.

C. THE TRIAL JUDGE DID NOT IMPOSE A MORE SEVERE SENTENCE ON APPELLANT BECAUSE APPELLANT INDICATED HIS PLAN TO APPEAL.

Appellant notes portion of the record in which the lower court did announce that he was going to take the possibility of appeal into consideration at the time of sentencing. Appellant's Brief, p. 41; R.T., p. 126a. However, appellant did not designate the proceedings at the actual time of sentencing as part of the record when he wrote his brief. Those proceedings are now part of the record on appeal.

Regardless of the law cited by appellant, the transcript of the proceedings at the actual time of sentencing reflects that the question of taking an appeal was not any factor at all in the sentencing. The following colloquy between the lower court and counsel for appellant makes that undeniably clear:

"Mr. Ely: Well, certainly, in order to - - We've already discussed whether or not an intention to appeal is to be a factor - -

"The Court: Oh, that's not a factor at all.

"Mr. Ely: Well, that being so, I'm sure that - -" Id. at 131.

There were factors which warranted the imposition of more than the mandatory sentence in this case, including:

(1) the absolute refusal of appellant to talk with the Probation Department, id. at 132;

(2) his prior criminal record, id.; and

(3) the finding that there was nothing extenuating or mitigating in appellant's behalf. Id. at 133-34.

Finally, the fact that the lower court recommended to the Attorney General that appellant's place of confinement be designated as the state institution where he was then confined, id., at 134, is inconsistent with the argument that the lower court was imposing a more severe sentence on appellant and oppressing him because he desired to appeal. If the lower court was really doing that, the lower court could have given appellant up to 40 years, and not make such a recommendation to the Attorney General.

V.

CONCLUSION

Appellee respectfully submits that appellant's conviction should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney

JOSEPH A. MILCHEN,
Assistant U.S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Joseph A. Milchen

JOSEPH A. MILCHEN